No. 12765

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Statement of Jurisdiction.

This is an appeal from a judgment of conviction rendered against appellant in the United States District Court for the Southern District of California, Central Division, upon a jury verdict finding appellant guilty of a violation of U. S. C., Title 18, Section 1621, perjury statute.

The indictment was in one count charging that defendant committed perjury in testifying before a regularly constituted grand jury for the Southern District of California on August 10, 1950. Appellant was sentenced to the custody of the Attorney General for imprisonment.

The District Court had jurisdiction under 18 U. S. C., Section 3231.

This Court has jurisdiction of the appeal under 28 U. S. C., Section 1291.

Statement of the Case.

The indictment is in one count and charged defendant under Title 18, U. S. C. A., Section 1621.

The charging portion of the indictment is summarized as follows:

That the grand jury was investigating the murder on February 28, 1950, of one Abram Davidian, who would have been the Government's witness at a trial and had been a witness before the grand jury in connection with indictment No. 21101. That the appellant was called as a witness in said investigation before the grand jury and asked to trace his whereabouts on February 28, 1950. Among other things, appellant stated he had a hair cut in a barber shop in Hollywood in the late afternoon of February 28, 1950, and that this was not true and that he was not in the barber shop on that day.

Questions in the Appeal.

Appellant's brief on appeal states three grounds of attack on the judgment.

(a) That the alleged perjury of appellant was not proved by the testimony of one witness and corroborating circumstances;

(b) That appellant was prejudiced by having the jury instructed that they could consider the indictment in case No. 21101 for the purpose of determining whether appellant's testimony before the grand jury was knowingly and wilfully perjurious.

(c) That the District Court erred in failing to grant a new trial on the ground that appellant was prejudiced by having the jury see a jury handbook in the jury room.

The Facts.

The Government's case rested on the testimony primarily of the three barbers who worked in the barber shop. Erwin Sharpe testified that the defendant had been in the barber shop on three occasions. The first occasion was a Thursday [Tr. p. 43]; he then became confused and said it was about the 28th of February. Upon being shown a calendar he resolved the confusion by stating that the first visit was Thursday, March 2, 1950 [Tr. p. 44]. Thereafter, in all his testimony, despite vigorous cross-examination, he maintained the first visit of defendant was March 2, 1950, and that defendant was not in the barber shop February 28, 1950.

Erwin Sharpe testified that the defendant was alone except for his small Schnauzer dog; that he was the barber who cut the defendant's hair; that it was approximately 5:30 to 6:00 o'clock in the evening and that all three barbers were present in the shop at the time of defendant's first visit.

George Sharpe stated that he was not in the barber shop on February 28th but that he was in the barber shop on March 2nd and on that day his brother Erwin Sharpe cut the defendant's hair [Tr. p. 118]; that all three barbers were there; that the defendant was accompanied by a small dog and that was the first time defendant had been in the shop.

Frank Riggi testified that he knew the defendant; that on the first occasion that the defendant visited the shop,

that all three barbers were present; that the defendant was accompanied by a small dog; that it was approximately 5:30 or 6:00 o'clock in the evening and that barber Erwin Sharpe had cut the defendant's hair.

The above facts have been stated in the light of the often enunciated rule which was summarized by the Supreme Court in *Glasser v. U. S.*, 62 Sup. Ct. 457, 315 U. S. 60, as follows:

> "The Supreme Court may not weigh the evidence or determine the credibility of witnesses in a criminal case, but the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it."

ARGUMENT.

There Was Sufficient Proof to Sustain the Jury's Verdict.

(a) The classic rule as to *quantum* of proof in perjury cases is that the oath of the defendant must be ranged against the oaths of two witnesses to the contrary in order to sustain a conviction. This rule has been gradually relaxed to the point that the law now is that one oath contrary to that of the defendant is sufficient if the one contrary witness is corroborated. The latest expression and discussion of the rule was in *United States v. Hiss,* 185 F. 2d 822, decided by the Second Circuit December 7, 1950, in which case certiorari has been denied. In that case, on page 829, in discussing the conviction on the first count, the Court points out that Whitaker Chamber's story, as contrasted to that of Alger Hiss, was sufficiently corroborated by the fact that the documents which Chambers said he had received from Hiss were typed on a typewriter belonging to Hiss.

Contrasting that corroboration with the instant case, we see how much more was introduced for corroboration in this case. Erwin Sharpe directly contradicts the defendant and places the defendant for the first time in the barber shop on March 2nd and states that defendant was not there on February 28th.

George Sharpe recalls all of the details of the first visit; including the date March 2, 1950, the fact that all three barbers were present; the time of day; the fact that his brother Erwin cut the defendant's hair; the fact that the defendant was accompanied by a dog, and positively states that it could not have been February 28th because he was not there that day.

Frank Riggi recalls the first time defendant was present. He recalls that Erwin Sharpe cut his hair; that all three barbers were present; that the defendant was accompanied by a dog; he recalls the time of day. He, however, does not recall the day. By putting the testimony of Riggi and George Sharpe together we find that we have more than another witness corroborating Erwin Sharpe. The testimony of the latter two might even have been enough for conviction.

Additional Cases on the Quantum of Corroboration Necessary.

U. S. v. Palese (3rd Cir.), 133 F. 2d 600;
U. S. v. Seavy (3rd Cir.), 180 F. 2d 837;
Boehm v. U. S., 123 F. 2d 791;
U. S. v. Margolis, 138 F. 2d 1002.

The District Court Did Not Err in Its Instructions.

(b) Appellant objects to the instruction by the Court that the jury could consider the existence of indictment No. 21101 in determining whether or not the defendant knowingly and wilfully intended to give false testimony on August 10, 1950. Attention is drawn to the carefulness with which the Court worded the two paragraphs of this instruction and the care with which the Court pointed out to the jury that they were not to consider or speculate concerning indictment No. 21101—the murder of Davidian—or the obstruction of justice investigation by the grand jury.

The Court's attention is also drawn to the fact that at the conclusion of the trial the Court refused to let the jurors see indictment No. 21101, for he felt prejudic

might arise in the jurors' minds from observing the nature of the charge, which was a narcotic violation, or the names of the other persons associated in the indictment of defendant, these being the names of notorious hoodlums in the Southern California area.

One of the necessary elements for the Government to establish was the materiality of the defendant's testimony before the grand jury. Murder, unless on a Government reservation, is not a Federal crime. The materiality of this investigation arose solely from the fact that the murdered man was to be a witness in the Federal District Court which would make his death, if done for the purpose of preventing his testimony, an obstruction of justice.

Defendant cites as his sole authority *Chipworthy v. U. S.*, 178 Fed. 442, and we point out the care which the Court and the Government exercised to keep out of the trial any speculation as to the defendant's connection with the murder of Abraham Davidian, any prejudice arising from the fact that the defendant was also charged in a narcotic case, and any speculation as to the defendant being connected with the obstruction of justice. In fact, in the very instruction which is complained of it is apparent the Court used great care in an endeavor to remove from the jurors' minds any speculation as to these matters. The Court endeavored by all means possible to confine the issues of the case strictly to that of perjury.

The Government contented itself solely with showing that an indictment existed, that defendant was also a defendant in that indictment, that Davidian had been a witness before the grand jury before the return of that indictment and was to be a witness for the Government at the trial, that Davidian had been killed and the date of his death. These matters were all necessary to show that

the whereabouts of the defendant on the day in question were material to the grand jury investigation.

On the question of materiality the Court's attention is drawn to

Carroll v. U. S., 16 F. 2d 651 (2d Cir.);

Luce v. U. S., 49 F. 2d 241.

On the question of motive or wilfullness, the statute under which the defendant was indicted contains the word "wilfully," the context being as follows:

> "Whoever having taken an oath before a competent tribunal, etc., that he will testify, declare or certify truly, etc., *wilfully* and contrary to such oath states or subscribes any material matter which he does not believe to be true is guilty of perjury * * *."

The fact that Davidian would have been a witness against the defendant is definitely material to show what motive defendant had for perjury and why defendant's whereabouts on February 28, 1950, was material.

In *Brzezinoki v. United States* (2d Cir.), evidence was allowed as against the defendant perjurer that he had indicated to another witness the possibility of securing money for absenting himself during the trial, the Court saying that such evidence went to show the motive for the perjurer's own false testimony.

In *Williamson v. U. S.*, 207 U. S. 425, at page 450, the Court discusses admissibility of evidence to show motive or intent in a conspiracy to commit perjury case. See also, *Ulmer v. U. S.*, 219 Fed. 641 (6th Cir.), at page 646

The District Court Did Not Err in Denying Defendant's Motion for a New Trial.

(c) Defendant's next citation is to the trial court's failure to grant a motion for new trial based on the affidavit of juror J. J. Leach.

It is settled law that a motion for a new trial is addressed to the sound discretion of the trial court. Defendant relies heavily on the case of *Mattox v. U. S.*, 146 U. S. 140. The reversal in that case was based on the fact that the trial court refused to accept an affidavit concerning the jury tampering. The Supreme Court stated that it is the general rule that a motion for a new trial is addressed to the sound discretion of the trial court. However, since the Judge did not accept the affidavit, he had, in effect, not exercised his discretion.

Of course there is a great deal of difference between the inocuous pamphlet which was considered by Judge Hall and the inflamatory newspaper account in the *Mattox* case.

Appellant's brief quotes certain short portions of the pamphlet entitled "A Handbook for Jurors," out of context in a strained effort to show something prejudicial to his client. However, when the Court reads the pamphlet it will be quite apparent that there was nothing in it which could prejudice the defendant Adams. A cursory reading of the pamphlet indicates that in a number of places it points out that the Judge is the sole source of the law to the jury [Tr. pp. 35, 46, 56].

Counsel makes much of the argument that the handbook gives sanctity to the fact that an indictment is by grand jury, yet in the handbook [Tr. pp. 47, 48], it is carefully pointed out that the indictment is merely a one-sided

presentation of the case and is not to be considered as evidence.

Judge Hall at the time of the *voir dire* examination pointed out to the jurors [Tr. p. 7] that an indictment was not evidence. At the same discussion he pointed out that he was the source of the law [Tr. p. 9]. He commenced his instructions with an admonition to the jury that they were to follow the law of the case as stated by him [Tr. p. 529].

In *Colt v. U. S.,* 190 Fed. 305, the Court considered the failure to grant a motion for a new trial where the bailiff had given a copy of the Federal Statutes to the Jury. The Court sustained the trial court, pointing out at page 310, that there was nothing in the Revised Statutes which had not been given to the jury in the Judge's instructions. The Court also pointed out that there was no showing that the prosecution had anything to do with the statutes being given to the jury.

In *Roberts v. U. S.,* 50 F. 2d 871, a group of jurors made an unauthorized visit to the scene of the crime. The Court, at page 872, points out that a motion for a new trial is addressed to the sound discretion of the trial court and, in the absence of a showing of abuse on his part, he will be sustained on review.

U. S. v. Compagna, 146 F. 2d 524.

In this case the trial Judge stopped and inquired of the jurors as to what testimony they had requested to be read and the Court had the following to say (p. 528) in dis-

cussing the rule that nothing should reach the jury except in the courtroom:

> "But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity."

This Court had a similar question before it recently in the case of *Orestus Cavness v. U. S.*, decided March 5, 1951. In this case a juror made two phone calls, one to his wife and the other to a garage, and the Court points out that there is a presumption of the juror faithfully performing his duties and makes the following remarks:

> "* * * appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct. [Fairmount Glass Works v. Coal Co., *supra,* 287 U. S. at 485.] And we adhere to the view that 'When twelve jurors sit down to deliberate upon their solemn duty of pronouncing innocence or guilt upon a fellow human each exposes his own particular views of the evidence to the sound judgment of all with the result that tangential views have little chance of survival and practically none of getting eleven approving votes.' "

To summarize, there was nothing in the pamphlet which could have prejudiced the defendant, especially in view of the constant admonition in the pamphlet and in the Court's instructions that the jury was to take the law of the case from the Judge.

Conclusion.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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